84894-7

No. 84894-7

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 62843-7-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SCOTT E. STAFNE,

Appellant,

vs.

SNOHOMISH COUNTY AND
SNOHOMISH COUNTY PLANNING DEPARTMENT,

Respondents.

ANSWER TO COUNTY'S PETITION FOR REVIEW

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I. THIS COURT SHOULD GRANT BOTH PETITIONS FOR REVIEW

Stafne does not oppose the petition for review filed by Snohomish County and the Snohomish County Planning Department related to the Court of Appeals' application of LUPA to the County's exercise of legislative power. Review is necessary because the Court of Appeals treated Snohomish County's legislative decision not to pass a citizen's proposal onto the legislative docket as if it was a quasi-judicial decision subject to LUPA review. While this is understandable given the mandate contained in SCC 30.74.030 (1) (a) and (d)[1] for the Snohomish County Planning Department to engage in the exercise of formal judicial power when reviewing citizen proposals (*i.e.* applying existing laws to citizen proposals) and the Planning Department's exercise of that power with

[1] These provisions mandate:

> (1) The department shall conduct an initial review and evaluation of proposed amendments, and assess the extent of review that would be required under the State Environmental Policy Act (SEPA) prior to county council action. The initial review and evaluation shall include any review by other county departments deemed necessary by the department, and shall be made in writing. ***The department shall recommend to the county council that the amendment be further processed only if all of the following criteria are met***, except as provided in SCC 30.74.040: ***(a) The proposed amendment is consistent with the countywide planning policies, the GMA, and other state or federal law; ... (d) Any proposed change in the designation of agricultural and forest lands is consistent with the designation criteria of the GMA and the comprehensive plan;*** [Emphasis Supplied]

regard to Stafne's docket proposal[2] it was not respectful of the County's power to determine when it is acting in a legislative capacity. Under the separation of powers doctrine it should be up to the County to determine whether it is exercising legislative power. It is then the judiciary's job to determine whether the County has exercised that legislative power in a manner contrary to law and/or in an arbitrary or capricious manner. Stafne agrees that the County, not the Court of Appeals, should determine when it is exercising legislative power delegated by the state legislature and Constitution.

Where the County exercises legislative power not made subject to judicial review by statute its land use decisions are subject only to the Superior Court's "inherent review" power. *Coughlin v Seattle School*

[2] The Planning Department's written memorandum applying these criteria to Stafne's proposal is set forth in the Clerk's Papers (CP) at 209 - 210. The memorandum documents a facially incompetent exercise of judicial power performed as a required precursor to the exercise of legislative power under the ordinance. *Francisco v. Board of Directors of Bellevue Public Schools, Dist. No. 405*, 85 Wn.2d 575,579 - 583, 537 P.2d 789 (1975) for a statement of those criteria which characterize the exercise of judicial power. As can be seen the Memorandum applies a repealed statutory definition of "forest land", *see* RCW 36.70A.030 (8), ("land primarily useful for growing trees") and doubtful case law, which was based on the repealed statutory definition of "forest land" (*Twin Falls, Inc. v Snohomish County*) to reject Stafne's proposal. CP 210. It also characterizes the mandatory statutory criteria Stafne relied upon and which is set forth at RCW 36.70A.080 (d) as being only a "regulation" which the County has the option not to ignore. CP 211

District No. 1, 27 Wn.App. 888, 621 P.2d 183 (1980) *abrogated in Haynes v Seattle School District No. 1*, 111 Wn. 2d 250, 253, & note 2,758 P.2d 7 (1988)[3]. In order to satisfy the standard for inherent review the plaintiff must show that the legislative decision is contrary to law and/or arbitrary or capricious. *See e.g. Teter v. Clark County,* 104 Wash.2d 227, 234, 704 P.2d 1171 (1985); *Palermo at Lakeland, LLC v. City of Bonney Lake*, 147 Wn.App. 64, 193 P.3d 168 (2008) *review denied* 166 Wn.2d 1003, 208 P.3d 1123 (2009). An act is arbitrary or capricious if it is a willful and unreasonable action, taken without consideration and regard for facts or circumstances. *See Isla Verde Int'l Holdings, Inc. v. City of Camas,* 146 Wash.2d 740, 769, 49 P.3rd 867 (2002) (citing *Teter,* 104 Wash.2d at 237, 704 P.2d 1171)).

The Court of Appeals erred in refusing to respect the County's determination that it was making a legislative decision which required review under the "contrary to law and/or arbitrary and capricious standard"; rather than LUPA. The Panel also erred in failing to apply the "inherent power of review" standard to Stafne's claim that the legislative decision process engaged in by the County, which was predicated upon an

[3] The *Coughlin* Court correctly applied the "inherent power" standard for the Superior Court to obtain jurisdiction in those cases where no statute affords jurisdiction. *Haynes* simply ruled that the Court of Appeals had been incorrect in its determination that no statute afforded appellants' jurisdiction to appeal a legislative decision of the school board.

incompetent and unreviewable exercise of judicial power, was contrary to law and/or constituted arbitrary or capricious conduct.

The County's argument to this Court that the Growth Management Board has jurisdiction over the County's legislative decision not to pass Stafne's proposal on for legislative docketing is far different than what the County has argued to the Skagit County Superior Court in other cases. *See e.g.* CP 318 - 329 where attorneys for the County argued in a different case, which Stafne handled for the plaintiffs as an attorney[4], that:

> ... RCW 36.70A.290(2) provides that, "All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter ... must be filed within sixty days after publication by the legislative bodies of the county or city." (emphasis added) Under these statutory provisions, the Hearings Boards' jurisdiction under RCW 36.70A.280 (1)(a) and 290(2) extends only to the (1) adoption of comprehensive plans, (2) adoption of development regulations, or (3) amendment of either comprehensive plans or development regulations. Thus, the Hearings Boards have no jurisdiction to review a decision by a county not to adopt an amendment to a plan or regulation, which is the type of decision the County made with respect to the Tartes' two docket applications.
>
> Case law from the Hearings Boards supports the fact that the Tartes may not appeal the types of decisions the County made here...." [All emphasis in original]

See also p. 323:

> In short, the Hearings Boards have no authority to review a county's decision to not amend its comprehensive plan or

[4] *See* CP p. 310

> adopt a related zoning map amendment request. Nor do the Hearings Boards have jurisdiction to review a county's decision to not place an application on the final docket." [Emphasis in original]

During oral argument to the Court of Appeals counsel for the County conceded that had Stafne attempted to appeal the County Council's docketing decision to the Growth Management Board, the County would have argued the Board had no jurisdiction to hear Stafne's appeal. So why is the County now arguing that the Growth Management Board should have jurisdiction to hear appeals of decisions not to pass citizen proposals onto the final docket?

The County's briefing and other evidence suggests the County's goal was to write an ordinance which would make Council determinations regarding citizen docket proposal unreviewable by the judiciary pursuant to any existing land use statute. Declaration of Gene Miller[5]. When

[5] Gene Miller is a member of the Snohomish County Planning Commission and was a Snohomish County senior planner for many years. Miller declaration, paragraphs 2 – 4. Stafne designated Miller's declaration as part of the record on appeal on June 16, 2009. Miller's declaration was included as a part of the record before the Superior Court as evidence to show County policy was to use arbitrary fact finding and adjudication in phase one of the docketing process to prevent citizen proposals from being passed on for legislative consideration in phase two. Miller's declaration shows, among other things, that PDS initially recommended a citizen proposal be passed onto the phase two because, among other things, PDS found the citizen's property was served by utilities. But after political objections were lodged against the citizen's proposals and it was moved to another docket, PDS found the same

challenged by the proposition that the judiciary had inherent jurisdiction to review legislation that was alleged to be arbitrary, capricious, or contrary to law the County opted to argue the Council's denial of a citizen proposal should be reviewed by the Growth Management Board. But this argument fails to take into account that under SCC 30.74.030 (a) and (d) the determination Stafne was asking for involved a quasi-judicial review of the legal consequences of site-specific Boundary Line Adjustments (BLAs) final land use decisions, which ***had been*** granted to parcels in the Twin Falls Estates rural settlement. The Growth Management Act does not contemplate that the Growth Management Hearings Board will review quasi-judicial decisions regarding the consequences of site specific land use decisions. *Woods v Kittatas County*, 174 P.3rd 25,31, 152 Wash.2d 597 (2007). ("A challenge to a site-specific land use should be brought in a LUPA petition at superior court.")

The Planning Department's erroneous quasi-judicial decision relating to the already decided final land use decisions inside the Twin Falls' rural settlement (which is set forth at CP 209 - 211) was the only

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specific site had no access to utilities even though the record was clear the site had access to utilities. Through this example and others Miller's declaration avers that PDS duties pursuant to SCC 30.74.030 (a) and (d) are performed not to reach a correct factual and legal analysis but are used to provide an arbitrary and unreviewable basis for PDS and/or the County Council avoid hearing citizen proposals based on political considerations disguised as impartial fact finding and adjudication.

basis for making the Council's legislative decision to deny Stafne's application. If the County is correct, then the Growth Management Board would frequently become involved in deciding the consequences of site-specific final land use decisions. This function is inherently judicial, *see* Const, Art. IV, Sec. I, and has been reserved for the Courts by the legislature. *Woods v Kittatas County*, supra.

The County has no Constitutional authority to arrogate the exercise of unreviewable judicial power to itself as part of its legislative process. Article IV, Section I provides: "The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide." When a municipality exercises judicial power, even as a predicate to legislation, such power "must be exercised under the same limitations, precautions, and sanctions as any other judicial proceedings." *Francisco v. Board of Directors of Bellevue Public Schools, Dist. No. 405*, 85 Wn.2d 575,579 - 583, 537 P.2d 789 (1975).

The decision Stafne wanted made, and the one SCC 30.74A.030 (1) (a) and (d) offered to make, was a judicial one; namely a determination of the consequences of site specific BLA final land use decisions to the parcels in the Twin Falls Estates' rural settlement. Stafne

reasoned that application of the existing statutory "forest land" definition and county criteria would require the County to find and conclude that none of the less than forty acre lots which had access to public utilities could be considered forest land. *See* Stafne's Opening Brief to the Court of Appeals, pp. 26 - 30 and citations therein. But what happened was the County Planning Department engaged in grossly inadequate fact finding[6] and applied a repealed statutory definition of "forest land" to lots which never existed in Twin Falls' rural settlement. CP 209 - 211. The County Council affirmed this judicial result declaring the consequences of the BLA final land use decisions by making a legislative decision not to pass Stafne's proposal on to the final docket. This legislative decision is arbitrary and capricious and contrary to law because of its flawed judicial analysis and because the ordinance under which this judicial decision was rendered purports to grant unreviewable judicial power to the County Planning Department as a predicate for the County Council's exercise of legislative power.

The ordinance in question is responsible for the separation of powers problems that occurred in this case, i.e. the application of repealed law to parcels which no longer existed, because the ordinance purports to make legislative decisions turn on the exercise of unreviewable, gratuitous

[6] *See* Stafne's Opening Brief to the Court of Appeals, pp. 15 - 17

judicial power. Indeed, it is the Council's position that it does not need to consider the Planning Department's quasi-judicial determinations when exercising its legislative powers. If this is so, why does the ordinance mandate the Planning Department exercise any judicial power at all?

No one had appealed those site specific BLA decisions which occurred at the Twin Falls' rural settlement. So under LUPA they were final land use decisions. By making legislative land use decisions turn on the application of law to fact, SCC 30.74.030 (a) and (d) attempt to arrogate to the County Council the power to adjudicate the meaning of final site-specific land use decisions ***as part of a new legislative process***. But the County has no power to take away the consequences of final land use decisions that have already been made. The County, like everybody else, must abide by the consequences of final land use decisions. *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002).

Requiring the Planning Department to exercise formal judicial power as a predicate to the exercise of legislative power places the cart before the horse in terms of the Separation of Powers and impermissibly subordinates judicial power to legislative power. Therefore, this appeal involves significant questions of law under the Washington Constitution which should be decided by this Court pursuant to RAP 13.3 (b) (3). It

also raises public interest issues regarding governmental regulation of real property in Washington, which merit review pursuant to RAP 13.3 (b)(4).

II. CONCLUSION

This Court should consider all of the separation of powers issues raised by the parties' petitions for review. The Court should do this because the Court of Appeals decision allows the County Council to arrogate to itself the power to declare the consequences of site specific land use decisions as part of future legislative processes in violation of LUPA and the traditional province and duty of the judiciary to declare what the law is.

Respectfully Submitted,

Scott E. Stafne

Scott E. Stafne, WSBA #6964

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SCOTT E. STAFNE, Appellant, vs. SNOHOMISH COUNTY AND SNOHOMISH COUNTY PLANNING DEPARTMENT, Respondents.	NO. 84894-7 (COURT OF APPEALS NO. 62843-7-I) CERTIFICATE OF SERVICE

I, Larry Stauffer, certify that on the 30th day of August, I caused to be served a true and correct copy of Scott E. Stafne's Answer to Snohomish County's Petition For Review upon the party listed below in the manner indicated:

Laura C. Kisielius, WSBA #28255 Bree Urban, WSBA #33194 Deputy Prosecuting Attorneys Robert J. Drewel Bldg., 7th Floor, M/S 504 3000 Rockefeller Avenue	Everett, Washington 98201-4046 [x] Electronic service [ ] Facsimile [x] U.S. Mail [ ] Hand Delivery

I declare under penalty of perjury _____under the laws of the State of Washington that the foregoing statements are true and correct.

DATED at Everett, Washington, this 29th day of August, 2010

S/ Larry Stauffer

OFFICE RECEPTIONIST, CLERK

To: Scott E. Stafne
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Subject: RE: Stafne v Snohomish County, Supreme Court No. 84894-7

Rec. 8-30-10

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From: Scott E. Stafne [mailto:stafnelawfirm@aol.com]
Sent: Sunday, August 29, 2010 8:36 PM
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Subject: Stafne v Snohomish County, Supreme Court No. 84894-7

Please find attached for filing "answer to county's petition for review" and certificate of service in Stafne v Snohomish County, Supreme Court No. 84894-7.

Thank you.

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